SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 20

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

APPELLANT'S REPLY BRIEF

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This reply brief for convenience and for the sake of clarity is keyed to the divisions of Appellee's argument. Before replying, however, specifically to the arguments of the Appellee, it should be observed that Table "A" at page 26 of Appellee's brief under subdivision I-E does not accurately reflect the construction of the emergency inheritance tax by the Supreme Court of Wisconsin as reproduced at p. 13 of the record (254 Wis. 24 at p. 28) being the Table "A" approved by it, in that, as will be seen by inspection, the state supreme court construed the emergency tax as a *single integral tax* computed on the combined Wisconsin normal and Wisconsin estate taxes and not as two *separate and distinct* emergency taxes. This conforms to the statutory reference thereto as fol-

lows: "In addition to the taxes imposed by sections 72.01 to 72.24 and 72.50 to 72.61 of the statutes an emergency *tax* * * * is hereby imposed * * *." (Sec. 72.74(2) Wis. Stats.) (emphasis added) *Thus, under the unambiguous statutory formula unaided by construction to the contrary, the Wisconsin normal and estate taxes are reciprocal variables always producing an emergency tax equal to 24% of the federal basic tax less 80% of death duties paid other states in the case of Wisconsin estates subject to the Wisconsin estate tax.*

I-A (pp. 15-18)

Appellee in this subdivision of its argument cites in support thereof *Butler Bros. v. McColgan* (1942) 315 U.S. 501 and *Edison Stores, Inc. v. McColgan* (1947) 30 Cal. (2d) 472, 176 Pac. (2) 697, 183 Pac. (2) 16, which latter case was decided so far as the constitutional question was involved on the authority of the *Butler Bros.* case, and both were based on the same California statute. It makes the bold assertion that the appellant carries the burden of showing by "clear and cogent evidence" that the Wisconsin Statute here under consideration results in extra-territorial values being taxed. That the *Butler Bros.* case is not in point is obvious for the following reasons.

1. In the *Butler Bros.* case, the statute itself recognized the necessity for apportionment and properly provided therefor, whereas the Wisconsin Emergency Inheritance Tax Statute makes no provision for such apportionment.

2. In the *Butler Bros.* case the question whether or not extraterritorial property was employed as a measure of the tax was considered as depending for resolution wholly upon conflicting facts. These facts being resolved against the taxpayer the "clear and cogent evidence" rule

is analogous to the appellate rule in equity cases that a finding of fact by the trial forum may not be disturbed unless against the clear weight and great preponderance of the evidence. It has no application in the case at bar since there never was and is not now a dispute as to the facts.

3. In that case (*Butler Bros.* being an Illinois corporation), a California statutory income tax apportionment formula was the subject in controversy. It is elementary that income taxes have never been considered in the same category as inheritance taxes with respect to a state's power to levy them. The objects forming the incidence of the tax and the rules governing the exercise of the power are readily distinguishable. For example, the right to income is an intangible property right and not tangible property. A state may therefore tax a resident thereof domiciled therein upon the net income derived from extraterritorial tangible property (300 U.S. 308), whereas the subject and incidence of an inheritance tax is based on a state's control of the devolution of any particular tangible or intangible property as the case may be. In the same subdivision of Appellee's argument, Appellee recites that the "design and application" of the Wisconsin inheritance tax statutes "is such as to impose taxes only on the property which is within the taxing jurisdiction of the State of Wisconsin" (page 18). So far as this statement is intended to include within its sweep, the emergency inheritance tax in question, it clearly begs the whole question at issue herein.

The criticism of Appellant's tables on p. 13 is wholly without support in the facts, since the emergency tax is always 24% of the federal basic estate tax less death duties paid other states, regardless of the amount or character of any decedent's estate.

The criticism of Appellant's hypothetical table on page 16 is likewise unsound since it follows precisely the factors required by the state statute when the federal credit is properly apportioned as between property subject to the state's taxing jurisdiction and property not so subject. Surely the state should not be heard to complain because of the Appellant's failure to assign as error the failure to apportion the Wisconsin estate tax, a tax which in Appellant's opinion is also subject to apportionment. Simply because the laws of another taxing sovereignty operate to indemnify the taxpayer against an unconstitutional tax of another does not make such tax any the less invalid. Here the indemnifying sovereignty is the federal government. It might as well also be one of the several states or even a foreign government. The taking is nevertheless beyond the taxing state's power.

I-B (pp. 18-22)

Appellee argues that because the language of the Wisconsin emergency tax statute recites that the "30% additional tax 'is hereby imposed upon all transfers of property which are taxable under the provisions of' Sections 72.01 to 72.24 and Sections 72.50 to 72.61" (p. 18), only Wisconsin property is being employed as a measure of the tax. But Sections 72.50 to 72.61 levying the so-called Wisconsin Estate Tax is expressly laid upon and measured by the federal basic estate tax credit less, so far as material, death duties paid the states. Hence the property forming the measure of this tax is all property within the taxing jurisdiction of the United States and not merely Wisconsin property. The demonstration of the Appellee based on the language of the statute is therefore clearly invalid.

The principal burden of this subdivision of the argument is that the state of Wisconsin has taken in dollars less than its properly apportioned share of the federal credit (87.52%) viz. 55.92%. But this figure is in fact in error by 25% as will be seen from the state's own computation of the emergency tax as construed by the state supreme court, Table "A" R. 13, 254 Wis. 24 at p. 28, (i.e. 630, 709.62—57,325.71 = 573,383.91 or 90.92% of the federal credit), which it will be seen is in excess of the apportionment which the statute should have required.

It arrives at the former figure by declaring that the deductions from the basic federal credit, namely the normal tax and taxes paid Florida and Illinois, so operate, but insists that these deductions are matters of legislative grace by which of course can only be meant that the state is not required to allow them as a matter of right, but is otherwise entitled to take the full federal credit. Moreover, 24% of the federal basic tax is also materially less than 80% of the federal credit, but even that tax is still measured by property beyond the taxing jurisdiction of the state.

Here we find the core fallacy of the state's position, which has been expressly rejected by this court in the cases of *Owensboro National Bank v. Owensboro* and *Home Savings Bank v. Des Moines*, more fully cited in Branch II of Appellant's argument. This is not, as was there held, a question of economic equivalence, but whether or not the state has the power to incorporate in its tax base for the reasons stated in the *Frick* case resolving the question in the negative the value of tangible property beyond its taxing jurisdiction, regardless of whether the method actually adopted produces a lesser,

equal or greater revenue, than would be the case were such property excluded from the tax base. These cases would clearly appear to require a negative answer on the cogency of their reasoning.

I-C (pp. 23-24)

The Appellant makes no claim that the total Wisconsin Inheritance Taxes may not exceed the federal credit as will be readily seen from an analysis of Appellant's hypothetical table on page 16 of Appellant's brief. Hence Appellee's argument in relation thereto in connection with extraterritoriality is wholly irrelevant.

I-D (pp. 25-26)

Appellant argues that were the entire estate of the decedent in Wisconsin, the total Wisconsin Inheritance Taxes would be larger. This is so obvious that its relevancy does not appear. But the unqualified statement of Appellee that the Appellant asserts the total Wisconsin Inheritance taxes are higher because of out of state property reveals a misconception of Appellant's position, which is that the total death duties levied by the state are higher than they would have been if the federal credit had been apportioned, as will fully appear from Appellant's hypothetical table on page 16 of Appellant's brief.

I-E (pp. 27-28)

The Appellant makes no contention that the state may not take into consideration extraterritorial factors in laying a tax. His sole contention is that when such factors are taken into consideration, the tax must nevertheless

be apportioned as between the incidence of the tax within and without the taxing jurisdiction of the state. Appellee cites *Maxwell v. Bugbee* and *Great Atlantic & Pacific Tea Co. v. Grosjean*, the very cases cited by Appellant as expressly requiring apportionment in such a case. The Appellant is at a loss to see where the *J. C. Penney Co.* case involving the taxation of net income, also cited by Appellee on this point, has any relevancy.

Moreover, in the *Frick* case, the very same argument that the state brings forward to the effect that it is taxing only Wisconsin property since more than 80% of the decedent's estate was subject to its taxing jurisdiction would have validated the tax there, since the highest bracket of Pennsylvania's inheritance tax was only 5% and it is apparent that more than 5% of the *Frick* estate was within the taxing jurisdiction of Pennsylvania.

I-F (pp. 29-31)

From what has already been said, Appellee's argument under this subdivision of its argument clearly begs the whole question at issue in the case at bar, namely the state's assertion that the pattern of the Wisconsin Inheritance Tax Statutes is the imposition of taxes only on property within its jurisdiction.

II (pp. 32-34)

The second branch of Appellant's argument to the effect that the 30% of additional emergency inheritance tax is not directly geared to the federal estate tax and that Appellant's statement that this tax is always 30% of the federal estate tax credit and 24% of the federal basic estate tax is both incorrect and misleading is itself incorrect and misleading, in that Appellant expressly

added the qualifying factor "reduced by 30% of death duties, if any, levied by other states". By reference to Appellant's brief, it will be seen that the Appellant stated his position as follows: (p. 8 of Appellant's brief)

"The 30% Wisconsin Emergency Inheritance Tax imposed by Sec. 72.74, Wis. Stats. when applied to Wisconsin residents subject to the Wisconsin Estate Tax imposed by Sec. 72.50 Wis. Stats. where 80% or more of the estate is within the taxable jurisdiction of the State of Wisconsin is always exactly 24% of the federal 1926 basic estate tax (i.e. 30% of 80%) reduced by 30% of death duties, if any, levied by other states. It is therefore directly measured by the federal tax, which in turn is based on the value of property both within and without the taxing jurisdiction of Wisconsin. *It is entirely unnecessary to even know what property the decedent had in Wisconsin in order to compute it, but merely the amount of death duties, if any, paid other states.*"

This statement is a correct exposition of the operation of the emergency tax and cannot be gainsaid. Similarly, the tables at page 13 of Appellant's brief cannot be impeached for want of accuracy, and the Appellee's criticism of them is clearly without a factual or mathematical basis.

The result, namely that the actual emergency tax is always 24% of the federal basic tax less death duties paid other states, is in no sense coincidental, that is, a unique event in the case at bar, but holds true in each and every application of the law regardless of the size, character or location of the estate, and has been unequivocally so shown in Appellant's brief.

CONCLUSION

It is therefore believed that the decision of the Supreme Court of Wisconsin cannot stand if the *Frick* case and other relevant opinions of this Court and the rationale underlying the limitation of a state's taxing power to subjects within its jurisdiction are also to stand.

Respectfully submitted,

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